INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	5
Argument:	
The Board of Tax Appeals is without jurisdiction to apply an overpayment of tax for a year in which no deficiency has been determined by the Commissioner against the liability for a year in which the Commissioner has determined a deficiency	7
Conclusion	28
Appendix	29

CITATIONS

Cases:	
Barry v. *Commissioner*, 1 B. T. A. 156	24
Blair v. *Oesterlein Co.*, 275 U. S. 220	17
Bull v. *United States*, 295 U. S. 247	8, 18, 28
Commissioner v. *Dixie Margarine Co.*, 127 F. 2d 292	23
Commissioner v. *Forest Glen C. Co.*, 98 F. 2d 968, certiorari denied, 306 U. S. 639	22
Cornelius Cotton Mills v. *Commissioner*, 4 B. T. A. 255	22, 24
Couch, B. T., Glue Co. v. *Commissioner*, 12 B. T. A. 1321	22
Dickerman & Englis, Inc. v. *Commissioner*, 5 B. T. A. 633	22
Dixie Margarine Co. v. *Commissioner*, 115 F. 2d 445	23
Goldsmith v. *Bd. of Tax Appeals*, 270 U. S. 117	16
Gottlieb Realty Co. v. *Commissioner*, 28 B. T. A. 418	23
Gould-Mersereau Co. v *Commissioner*, 21 B. T. A. 1316	22
Greenleaf Textile Corp. v. *Commissioner*, 26 B. T. A. 737, affirmed, 65 F. 2d 1017	23
Gress Manufacturing Co. v. *Commissioner*, 3 B. T. A. 977	25
Heiner v. *Diamond Alkali Co.*, 288 U. S. 502	17
Helvering v. *Rankin*, 295 U. S. 123	16
Helvering v. *Taylor*, 293 U. S. 507	15
Heyl v. *Commissioner*, 34 B. T. A. 223	22
Jones v. *Commissioner*, 34 B. T. A. 280	21
Lyeth v. *Hoey*, 112 F. 2d 4	22
McEachern v. *Rose*, 302 U. S. 56	28

Cases—Continued. Page

Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716 ..... 16, 17
Red Wing Potteries, Inc. v. *Commissioner*, 43 B. T. A. 841 .. 22
Ribbon Cliff Fruit Co. v. *Commissioner*, 12 B. T. A. 13 22
Stone v. *White*, 301 U. S. 532 ..... 18, 19, 21, 28
United States ex rel. Girard Co. v. *Helvering*, 301 U. S. 540 .. 18, 19, 21
United States v. *Union Trust Co. of Pittsburgh*, 13 F. Supp. 286 17
Virginian Hotel Corp. v. *Commissioner*, decided June 7, 1943 . 24
Williamsport Co. v. *United States*, 277 U. S. 551 ..... 9, 17

Statutes:

Internal Revenue Code:
Sec. 271 (U. S. C., Title 26, Sec. 271) 29
Sec. 272 (U. S. C., Title 26, Sec. 272) 11, 12, 29
Sec. 322 (U. S. C., Title 26, Sec. 322) 11, 14, 30
Sec. 912 (U. S. C., Title 26, Sec. 912) 11
Sec. 1100 (U. S. C., Title 26, Sec. 1100) 15, 31
Sec. 1101 (U. S. C., Title 26, Sec. 1101) 16, 31
Sec. 1102 (U. S. C., Title 26, Sec. 1102) 16
Sec. 1103 (U. S. C., Title 26, Sec. 1103) 16
Sec. 1104 (U. S. C., Title 26, Sec. 1104) 16
Sec. 1105 (U. S. C., Title 26, Sec. 1105) 16
Sec. 1111 (U. S. C., Title 26, Sec. 1111) 17
Sec. 1114 (U. S. C., Title 26, Sec. 1114) 17
Sec. 1117 (U. S. C., Title 26, Sec. 1114) 16
Sec. 1118 (U. S. C., Title 26, Sec. 1118) 16
Sec. 3774 (U. S. C., Title 26, Sec. 3774) 14
Sec. 3775 (U. S. C., Title 26, Sec. 3775) 14
Sec. 3801 (U. S. C., Title 26, Sec. 3801) 27
Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 250 9
Revenue Act of 1924, c. 234, 43 Stat. 253:
Sec. 206 23
Sec. 274 10
Sec. 308 10
Sec. 900 ..... 9, 10, 15
Sec. 904 16
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 206 23
Sec. 274 ..... 11, 12, 14, 24
Sec. 284 11
Sec. 308 11
Sec. 319 11
Secs. 1000–1005 11
Sec. 1000 ..... 15, 16
Sec. 1005 11

Statutes—Continued.

	Page
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 272	11
Sec. 507	11
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 272	11
Sec. 513	10
Sec. 810	11
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 272	11
Sec. 322	28
Sec. 504	11
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 272	11
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 272	11
Sec. 820	27
Revenue Act of 1942, c. 619, 56 Stat. 798:	
Sec. 504	12, 17, 31
Sec. 510	12
Miscellaneous:	
H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 72 (1942–2 Cum. Bull. 701)	12
H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8 (1939–1 Cum. Bull. (Part 2) 241)	8, 9, 17
H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 172–173 (1942–2 Cum. Bull. 372)	12
Magill, *The Impact of Federal Taxes*, 201	17
9 Mertens, *Law of Federal Income Taxation*, Sec. 50.10	12
Restatement, Judgments, c. 3, Introductory note; Sec. 47, comment e	21
Rules of Practice Before the United States Board of Tax Appeals (17th Ed.), Rule 2	17
S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8–9 (1939–1 Cum. Bull. (Part 2) 266)	9
S. Rep. No. 1567, 75th Cong., 3d Sess., pp. 48–52 (1939–1 Cum. Bull. (Part 2) 799)	27

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 53

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GOOCH MILLING & ELEVATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 10–12) is unreported. The opinions of the Circuit Court of Appeals (R. 21–32) are reported in 133 F. 2d 131.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 29, 1943 (R. 32–33). The petition for a writ of certiorari was filed on April 28, 1943, and was granted on June 1, 1943. The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Commissioner determined deficiencies in income and excess profits taxes for the fiscal year ending June 30, 1936, by adjustment of the taxpayer's opening inventories. The taxpayer appealed to the Board of Tax Appeals from that determination alleging that the adjustment of inventories resulted in an overpayment of its taxes for the fiscal year ending June 30, 1935, which it requested the Board to offset against the deficiencies for 1936. The question presented is whether the Board has jurisdiction to determine and to apply any overpayment of tax for the fiscal year 1935 against the deficiencies for the fiscal year 1936.

STATUTES INVOLVED

The applicable statutes are set out in the Appendix, *infra*, pp. 29–32.

STATEMENT

The respondent taxpayer is a corporation which files its returns on the basis of a fiscal year ending on June 30. Following the death of its president on June 11, 1938, an audit of its books disclosed that all inventories as far back as 1928 were erroneous. The taxpayer's balance sheet for the year 1936 shows an opening inventory of $361,701.88 and a closing inventory of $345,017.43.

The Commissioner reduced the opening inventory by $237,104.33. The reduced inventory was first computed by the taxpayer's accountant and was accepted by the Commissioner as the basis for his computation of tax for the fiscal year 1936. The deficiencies here involved result primarily from this adjustment of inventory. The deficiencies so computed amount to $4,731.69 in income tax and $1,931.73 in excess-profits tax. (R. 10–11.)

Based upon corrected inventories, the taxpayer had overpaid its income taxes for all the fiscal years 1928 to 1934, inclusive, in excess of $8,000. A revenue agent's report for the fiscal year 1935 showed an overassessment of $7,935.58. The refund of this amount, however, was barred by the statute of limitations. (R. 11.)

Taxpayer's original petition to the Board (R. 3) alleged that there were no deficiencies in income and excess profits taxes for the fiscal year ending June 30, 1936, claimed a refund due of $8,288.43, and alleged that the Commissioner had erroneously reduced the taxpayer's inventory at June 30, 1935, in the aggregate amount of $238,277.63, which was added to the taxpayer's income for the fiscal year ended June 30, 1936, but was not deducted from the taxpayer's income for the fiscal year ended June 30, 1935 (R. 4–63. On April 30, 1941, pursuant to a motion filed ten days earlier (R. 1), the taxpayer filed with the Board an amended petition which repeated the allegations

of the original petition and added paragraphs 3½, 4a½ and 4½ (R. 4–6).

The amended petition alleged that if the adjusted inventory used by the Commissioner for the fiscal year ended June 30, 1936, were used in computing the taxable income for the fiscal year ended June 30, 1935, there would be a net loss for 1935 and an overassessment of the entire amount ($11,038.73) of the tax paid for that year (R. 5–6). The amended petition requested that the overassessment for the fiscal year 1935, a year which was not before the Board, be applied as an offset or recoupment against the deficiencies in tax found for the fiscal year 1936 (R. 6).

The amended petition was lodged with the Board and the motion for leave to amend was taken under advisement pending consideration of the case on its merits. The Commissioner objected to the filing of the amended petition upon the ground that the Board was without jurisdiction to consider the matters therein contained which related to tax liability for the fiscal year ended June 30, 1935, a year in which no deficiency in tax had been found by the Commissioner. (R. 10.)

The Board held that it had no jurisdiction to apply the doctrine of equitable recoupment and denied the motion for leave to file the amended petition (R. 11). The court below (R. 21), Judge Woodrough dissenting (R. 30), reversed the Board and remanded the case for further proceedings.

This will require the Board to determine, by an adjustment of inventories for the fiscal year ending June 30, 1935, whether there was an overpayment of tax for that fiscal year and, if so, to offset the overpayment against the deficiencies in taxes found for the fiscal year ending June 30, 1936, the only tax year before the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Board of Tax Appeals has jurisdiction to apply an overpayment of tax for the fiscal year ending June 30, 1935, a year in which no deficiency in tax had been found by the Commissioner and no appeal had been taken to the Board, against deficiencies in tax found for the fiscal year ending June 30, 1936.

2. In holding that the Board of Tax Appeals has jurisdiction to determine an overpayment of tax for a year in which no deficiency in tax had been found by the Commissioner.

3. In holding that the Board of Tax Appeals has jurisdiction to apply the equitable doctrine of recoupment or set-off.

4. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

The Board of Tax Appeals (now The Tax Court of the United States) is an administrative

agency in the executive branch of the Government, not a court. It has no powers other than those specifically conferred upon it by statute; it has no general jurisdiction or equity power. And it was never designed to be an agency to settle generally the tax account between an individual and the Government.

The sole function of the Board is to review certain restricted classes of proposed assessments of additional taxes before the assessments are made. Before the Board can act at all, it is necessary that the Commissioner shall have made a determination of a deficiency and shall have notified the taxpayer thereof. If these steps have been taken and a petition for review of the Commissioner's determination is filed with the Board, then, with respect to income taxes, that body may determine the correct tax liability for the year as to which such a determination has been made. But it has no other function. The statute specifically provides that it shall be without jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

We submit that since the Board is without power to determine the tax liability for any year other than the year before it, and since in the instant case the only year before it was the fiscal year 1936, it must be plain that the Board is without power to apply any overpayments for prior years

against the liability for the fiscal year 1936. This view is supported by the words and scheme of the statute, by the decisions of this Court and by the consistent and uniform decisions of the Board itself since the enactment of the Revenue Act of 1926.

ARGUMENT

THE BOARD OF TAX APPEALS IS WITHOUT JURISDICTION TO APPLY AN OVERPAYMENT OF TAX FOR A YEAR IN WHICH NO DEFICIENCY HAS BEEN DETERMINED BY THE COMMISSIONER AGAINST THE LIABILITY FOR A YEAR IN WHICH THE COMMISSIONER HAS DETERMINED A DEFICIENCY

This case involves the income and excess-profits tax liability of the respondent taxpayer for the fiscal year ended June 30, 1936. That is the *only* year for which the Commissioner has determined any deficiencies, a fact which we think is of controlling importance in view of the sharply defined limitations upon the jurisdiction and power of the Board of Tax Appeals. For purposes of this case it may be assumed, *arguendo,* that the taxpayer has overpaid its tax for the fiscal year ended June 30, 1935. The decisive point here is that the Board of Tax Appeals, in determining the taxpayer's liability for 1936, is without jurisdiction to determine any alleged overpayments for other years and subtract them from the 1936 taxes.

This result follows from the narrowly circumscribed powers which Congress has committed to the Board, and it is wholly irrelevant that relief by the way of equitable recoupment might be available if the proceedings were initiated in a court having general equity powers.[1]

The basic scheme of federal tax collection is one of assessment and payment first and litigation, if any, afterward. *Bull v. United States,* 295 U. S. 247, 259, 260. With respect to income taxes the taxpayer initially assesses himself in filing his return and pays the tax accordingly. If the Commissioner thinks the taxpayer has set the figure too low he assesses an additional amount. As in the case of the initial self-assessment, payment of the additional assessment is due immediately and is subject to collection by the usual methods, including distraint. Historically, the taxpayer's only judicial remedy, if he thought he had been wronged, was to bring an action in the District Court or in the Court of Claims to recover the overpayment. It was early recognized, however, that in the field of income taxation the remedy of suit to recover an overpayment was inadequate, and in many cases failed to mitigate hardships occasioned by an incorrect additional assessment. See H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8 (1939–1 Cum. Bull. (Part 2) 241,

[1] However, it is doubtful whether such relief could be had in this case, even in the proper forum. See p. 28, *infra.*

246–247); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8–9 (1939–1 Cum. Bull. (Part 2) 266, 271–272). Accordingly, there was established in the Bureau of Internal Revenue in 1919 the Committee on Appeals and Review to hear appeals by taxpayers from proposed additional assessments.[2] And Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provided that, prior to payment of a deficiency found by the Commissioner, a taxpayer might file an appeal, within thirty days after notice by the Commissioner, and show cause why the deficiency should not be paid. Such appeals were handled by the Committee on Appeals and Review.[3]

The Committee on Appeals and Review was, of course, an integral part of the Bureau of Internal Revenue. In order to afford taxpayers an independent consideration, the Board of Tax Appeals was created by Section 900 of the Revenue Act of 1924, c. 234, 43 Stat. 253. That Act provided that when the Commissioner determined a deficiency in income, estate, or gift taxes, notification thereof should be sent to the taxpayer by registered mail, prior to the making of the assessment.

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[2] A somewhat similar function had previously been performed by the Advisory Tax Board which existed from March 13, 1919 to October 1, 1919. See *Williamsport Co.* v. *United States*, 277 U. S. 551, 562, note 7.

[3] *Ibid.* See also H. Rep. No. 179, 68th Cong., 1st Sess., p. 7 (1939–1 Cum. Bull. (Part 2) 241, 247); S. Rep. No. 398, 68th Cong., 1st Sess., p. 8 (1939–1 Cum. Bull. (Part 2) 266, 272).

The term "deficiency" was defined as the amount by which the proper tax exceeded the tax shown on the return. Within sixty days from the mailing of the notice the taxpayer could file an appeal with the Board of Tax Appeals, and the assessment was not to be made until the Board had rendered its decision. Sections 273, 274, 308. A decision of the Board was not binding upon either party. If it decided in favor of the Commissioner he was then free to make an assessment and proceed with the collection of the tax, but the taxpayer could thereafter sue for a refund in the usual manner. Similarly, the Commissioner could sue to establish an additional liability not found by the Board. In any subsequent court action the findings of the Board were only "prima facie evidence of the facts therein stated" [Section 900 (g)], and the issues were retried *de novo*.

The system set up under the Revenue Act of 1924 was found to be unsatisfactory in several respects and certain changes were made by the Revenue Act of 1926, c. 27, 44 Stat. 9. The Board was empowered by that Act to decide not only whether the deficiency determined by the Commissioner was correct or was excessive, but also whether there was an overpayment instead of a deficiency [Sections 284 (e) and 319 (c)] or, that the deficiency was greater than that originally determined by the Commissioner [Sections 274 (e) and 308 (e)]. The Board's decision was made

subject to review by the Circuit Courts of Appeals and thereafter by this Court [Sections 1000–1005] and until the decision of the Board became final, the Commissioner was precluded from proceeding with the assessment and collection of the deficiency [Sections 274 (a), 308 (a), and 1005]. When the Board's decision became final, the Commissioner was authorized to assess and collect the deficiency found by the Board [Sections 274 (b) and 308 (b)]. If it determined an overpayment instead of a deficiency, the overpayment thus determined was, when the decision became final, to be credited or refunded by the Commissioner in the same manner as other overpayments [Sections 284 (e) and 319 (c)].[4]

The pattern of the Board's function and jurisdiction has not since been altered.[5] It is plain from the statute and well settled that the fundamental prerequisite to the exercise of jurisdiction by the Board is the determination of a deficiency by the Commissioner and the mailing of a notice

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[4] Under later acts, however, the Board was required to determine whether a refund or credit was barred [Section 284 (e) as amended by Section 507 of the Revenue Act of 1928 and Section 504 (c) of the Revenue Act of 1934, c. 277, 48 Stat. 680, Section 322 (d) of the Internal Revenue Code; Section 319 (c) as amended by Section 810 of the Revenue Act of 1932, c. 209, 47 Stat. 169 and Section 504 (d) of the Revenue Act of 1934, Section 912 of the Internal Revenue Code.]

[5] See Section 272 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and the Internal Revenue Code. The Revenue

thereof.[6] In the case of income taxes, if a deficiency notice has been mailed and a petition for review has been filed with the Board, the Board's authority extends to the point where it may determine the correct tax liability *for the year covered by the deficiency notice,* but it has no other jurisdiction whatsoever. It cannot determine an overpayment for a year for which no deficiency was asserted or direct the Commissioner to credit such an overpayment against any deficiency which it has determined.

To put the matter beyond dispute, Section 274 (g) of the 1926 Act (Section 272 (g) of the Internal Revenue Code) provides:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary

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Act of 1934 extended the period for filing petitions with the Board to 90 days from the date of the mailing of the notice. By Section 504 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 957, the name of the Board of Tax Appeals was changed to The Tax Court of the United States, as of October 22, 1942. But Section 504 (b) specifically provided that the change in name was to have no effect on the jurisdiction, powers and duties of the agency. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 172–173 (1942–2 Cum. Bull. 372, 498); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 72 (1942–2 Cum. Bull. 701, 727. The Tax Court has also been given Jurisdiction of processing tax refunds by Section 510 of the Revenue Act of 1942.

[6] See 9 Mertens, *Law of Federal Income Taxation*, Sec 50.10.

> correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

Thus it is plain that in the instant case the Board was without power to determine whether the taxpayer had overpaid or underpaid its taxes for any year other than the fiscal year ending June 30, 1936. We think it must be manifest that if the Board is lacking in the authority to make such a determination, it is clearly without power to take the next step, i. e., to apply overpayments of years not before it against the taxes due for the year before it. Therefore, even if it should be assumed that the respondent has overpaid its taxes for the fiscal year 1935, and even if it be further assumed that on principles of equity it should be allowed to apply that overpayment against its liability for the following year, it is plain that the Board is without authority to grant the relief. The Board can do no more than to determine the correct tax for the fiscal year 1936. Its function ceases at that point.

The court below erred in not recognizing that the fact that the correction in the inventory made by the Commissioner would result in an overpayment for the fiscal year ended June 30, 1935 (refund of which was barred by the statute of limitations), was not a fact that was material in the

determination of the deficiency for the fiscal year ended June 30, 1936. Each tax year stands alone. The Commissioner was not prohibited from asserting a deficiency because of the barred refund of the earlier year;[7] and the determination of the correct tax for 1936 by the Board was not dependent in any way on whether there was an overpayment for 1935 or on whether that overpayment could be refunded. Recoupment can be availed of, if at all, only after both tax liabilities are known, and not in the process of determining one of those liabilities. Hence the suggestion of the court below that the doctrine of recoupment could be applied here, even though the Board was prohibited by Section 274 (g) from determining an overpayment for the year 1935, is wholly without merit. In order to allow a recoupment, the Board would have to possess authority (1) to determine an overpayment for 1935 and (2) to permit that overpayment to be recouped from the 1936 deficiency.

We have endeavored to show that the Board possessed no authority to determine the overpayment. It was equally lacking in authority to di-

[7] The Commissioner is authorized merely to apply an overpayment for one year against an *assessment* for another year, whether the assessment is of a tax disclosed by the return or is an assessment made after the decision of the Board becomes final. And he cannot apply an overpayment, the refund of which is barred by the statute of limitations, against an assessment. Sections 322, 3774, 3775 of the Internal Revenue Code.

rect a recoupment. It is quite true that the Board was created for "great remedial purposes." *Helvering* v. *Taylor*, 293 U. S. 507, 516. But it was not created as, and was never intended to be, a general nostrum. Its purpose was to stay the collection of an additional assessment of income, estate or gift taxes until there had been a decision by an independent body that the additional tax was due. It has no authority to alter the general tax procedure of payment first and suit afterward, except in the one respect that restricted classes of assessments proposed by the Commissioner are reviewed before they are made. It was never designed to be an agency to settle generally the tax account between an individual and the Government. Jurisdiction to order a recoupment was in no way essential to, or consistent with, the purpose for which the Board was created.

The court below assumed that Congress intended the Board to exercise powers similar to those possessed by the District Courts in deciding tax controversies and hence that it possesses the power to order a recoupment. This argument disregards the fact that the Board is an "independent agency in the Executive Branch of the Government" [Section 900 (k) of the Revenue Act of 1924; Section 1000 of the 1926 Act (amending Section 900 of the Revenue Act of 1924); Section 1100 of the Internal Revenue Code], that it is specifically provided that the Board shall have such jurisdiction as is conferred upon it by

specific provisions of the internal revenue laws [Section 1000, Revenue Act of 1926 (amending Section 904 of the 1924 Act), Section 1101 of the Internal Revenue Code], that no internal revenue statute has conferred upon it the power to direct recoupment, and that it possesses no general jurisdiction or equity power. As this Court has several times pointed out (*Goldsmith* v. *Bd. of Tax Appeals*, 270 U. S. 117, 121-122; *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716; *Helvering* v. *Rankin*, 295 U. S. 123, 131), the Board is an administrative agency, not a court. It does not possess either the organization[8]

[8] The Board (now the Tax Court) consists of sixteen members appointed for twelve-year terms by the President, with the advice and consent of the Senate (the members being designated as judges by the Revenue Act of 1942). There are no particular qualifications for the office and the members are subject to removal by the President (after notice and opportunity for a public hearing) for inefficiency, neglect of duty, or malfeasance in office [Section 1102 of the Internal Revenue Code]. The Board elects a chairman (now designated as presiding judge) every two years [Section 1103]. Hearings are conducted by a division of the Board (usually one member) appointed by the Chairman, and the decision of the division becomes the decision of the Board, unless a review by the full Board is ordered by the Chairman [Sections 1103 and 1118]. The Board is required to report in writing its findings of fact, opinion, or memorandum opinion, and in a case where there is a review by the full Board, the findings may be made by a member other than the one conducting the hearing [Section 1117]. The hearing may be had anywhere in the United States [Section 1105], though the Board's principal office is in the District of Columbia [Section 1104]. Unlike courts, where litigants must be represented by members of the bar, taxpayers have

or the powers of a court." In *Old Colony Tr. Co.* v. *Commissioner, supra,* Chief Justice Taft said (p. 725):

been permitted to be represented before the Board by accountants or other properly qualified persons. See, e. g., Rules of Practice Before the United States Board of Tax Appeals (17th Ed.), Rule 2; Section 504 (b), Revenue Act of 1942, c. 619, 56 Stat. 798.

The Board follows such rules of practice and procedure as it may prescribe from time to time [Section 1111], being bound neither by common law rules of pleading and practice or by the Federal Rules of Civil Procedure. It is required to follow the rules of evidence formerly prevailing in the equity courts of the District of Columbia [Section 1111], but otherwise devises its own procedure. It was originally expected that the Board would have a flexible and informal procedure [H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8, 1939–1 Cum. Bull. (Part 2) 241, 246–247], but the procedure which the Board developed has resulted in a hearing which has some of the aspects of a trial before a court without a jury. See Magill, *The Impact of Federal Taxes*, 207.

[9] The Board has no power to enforce its own judgments. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716. If a deficiency which it determines is not paid, assessment and collection proceed in the usual manner. If it determines an overpayment which is not refunded by the Government, the taxpayer must sue. The Board may issue subpoenas but must resort to the courts to enforce them [Section 1114 of the Internal Revenue Code]. See also *Blair* v. *Oesterlein Co.*, 275 U. S. 220; and *United States* v. *Union Trust Co. of Pittsburgh*, 13 F. Supp. 286 (W. D. Pa.). It has no power to punish for contempt. On the other hand, because it is an administrative agency, rather than a court, the Board may review determinations of the Commissioner which are not reviewable by the courts, as for example the discretionary determinations of the Commissioner in special assessment cases. See *Blair* v. *Oesterlein Co.*, 275 U. S. 220, and cf. *Williamsport Co.* v. *United States*, 277 U. S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502.

The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

Recoupment is an equitable doctrine of limited application in tax controversies. When a taxpayer brings a suit in the District Court or Court of Claims to recover a refund from the Government, the action is in the nature of an action for money had and received. He is required to show that he is in equity and good conscience entitled to a refund and the Government may raise the same defenses as might be raised by any defendant in such a suit, including the defense of a recoupment arising out of the same transaction. *Stone* v. *White,* 301 U. S. 532; *Bull* v. *United States,* 295 U. S. 247. The defense is allowed, not because the case involves a tax, but because of the nature of the proceeding and of the fact that the court has power to permit a recoupment.

Recognition of the fact that the Board cannot allow a recoupment underlies the decision in *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540. The case was decided on the same day as *Stone* v. *White,* 301 U. S. 532. In both of those cases testamentary trustees had erroneously paid the tax on income of the trust when it should have been paid by the beneficiary. The

liabilities of the beneficiaries had been barred by the statute of limitations, and any refund to the trustees would have inured to the advantage of the beneficiaries.

In *Stone* v. *White* an action was brought in the District Court by the trustees against the Collector to recover the tax. The Court pointed out that since in such an action (p. 535) "* * * the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right, * * *." It was held that the right of the trustee to maintain the action was inextricably related to the fact that it was one (p. 536) "* * * for the benefit and in the equitable interest of the *cestui.*" And that (p. 538) "Since in equity the one taxpayer represents and acts for the other, it is not for either to complain that the government has taken from one with its right hand, when it has, because of the same error, given to the other with its left." The Government's defense was described (p. 539) as "* * * comparable to an equitable recoupment or diminution of petitioners' right to recover."

In the *Girard Co.* case the proceedings commenced in the Board of Tax Appeals which entered final orders determining that the amounts paid by the trustees as taxes for the years involved were overpayments. The Commissioner

refused to make the refund and the trustees petitioned for mandamus to compel the refund. The Court stated (pp. 542–543):

> The petition for mandamus is predicated upon the determination of the Board of Tax Appeals that petitioner has made overpayments of taxes for the specified years. The Board has not ordered a refund. It could not rightly do so, for its jurisdiction is limited to the determination of the amount of deficiency or overpayment, * * * upon the petition of the taxpayer to review a deficiency assessment by the Commissioner. The Board is without authority to order a refund or a credit, although its decision is *res adjudicata* as to the questions involved in the computation and assessment of taxes for which a deficiency is claimed. * * * When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, * * * and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. * * * And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled

> to the refund. See *Stone* v. *White*, *supra*; * * *.

For these reasons it was held that the appropriate remedy was an ordinary suit for a refund and not mandamus. It is to be noted that it is of the very essence of the decision that the Board was without authority to apply the equitable doctrine of recoupment. For if the defense had been available to the Commissioner in the proceedings before the Board, he would have been precluded, upon elementary principles of *res judicata* (see Restatement, Judgments, c. 3, Introductory note; Section 47, comment e), from raising it in a subsequent suit for refund. Indeed the holding was not only that the defense was available in such a later suit, but that it could not have been availed of in the earlier Board proceedings.

The Board of Tax Appeals has itself consistently and uniformly denied its jurisdiction in such a situation. In *Jones* v. *Commissioner*, 34 B. T. A. 280, which involved a situation like *Stone* v. *White* and the *Girard Co.* case, the Commissioner did raise the defense of equitable recoupment. But the Board held (p. 283):

> Proceedings before the Board are not for the recovery of money had and received. The Board has no authority to order the Commissioner to refund or credit amounts overpaid as taxes. This is so even though refund or credit seems to follow as

> a necessary consequence of a decision by the Board. * * * Collection, payment, credit and refund are matters over which the Board has no jurisdiction whatsoever, and which it has no reason to consider, except as they may affect the question of the correctness of the deficiency as determined by the Commissioner. The function of the Board in this case ends when it determines that in fact there has been an overpayment of a certain amount and that a claim for refund was filed within two years after the overpayment was made. The Commissioner's alleged defense is in opposition to the refunding of the overpayment, not to the fact of overpayment. * * *

Other illustrative cases in which the Board has denied its jurisdiction to do what the court below has directed it to do in the instant case are: *Cornelius Cotton Mills* v. *Commissioner,* 4 B. T. A. 255; *Dickerman & Englis, Inc.* v. *Commissioner,* 5 B. T. A. 633; *Ribbon Cliff Fruit Co.* v. *Commissioner,* 12 B. T. A. 13; *B. T. Couch Glue Co.* v. *Commissioner,* 12 B. T. A. 1321; *Gould-Mersereau Co.* v. *Commissioner,* 21 B. T. A. 1316; *Heyl* v. *Commissioner,* 34 B. T. A. 223; *Red Wing Potteries, Inc.* v. *Commissioner,* 43 B. T. A. 841. See also *Commissioner* v. *Forest Glen C. Co.,* 98 F. 2d 968 (C. C. A. 7th), certiorari denied, 306 U. S. 639; Clark, J. dissenting in *Lyeth* v. *Hoey,* 112 F. 2d 4, 10 (C. C. A. 2d).

The holding of the court below appears to be the only decision since the enactment of the

Revenue Act of 1926 in which a different rule has been announced.[10]

To be sure, the Board may consider facts relating to the taxes for other years in order to determine the proper tax for the year before it. Thus where the statute provides that net losses for one year may be carried over and deducted in the following year,[11] the Board might be required to determine whether a loss claimed for the earlier year was in fact sustained at that time;[12] in order to determine the invested capital of a corporation it might be necessary

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[10] The point lurked in *Dixie Margarine Co.* v. *Commissioner*, 115 F. 2d 445 (C. C. A. 6th). However, the question of the jurisdiction of the Board of Tax Appeals was neither briefed nor argued. And the court's opinion shows that it considered only whether the case was a proper one on the merits for the application of the doctrine of recoupment and whether the statute of limitations had any bearing, both of which points it resolved in favor of the taxpayer. The point was called to the court's attention for the first time in a petition for rehearing which the Government attempted to file out of time, but the court denied the Government's motion for leave to file the petition out of time. The Board thereupon entered its order in conformity with the mandate of the court. The Board denied the motion of the Commissioner to vacate its decision on jurisdictional grounds, and the Commissioner appealed. The Circuit Court affirmed on the ground that the Board's order was in conformity with the mandate. *Commissioner* v. *Dixie Margarine Co.*, 127 F. 2d 292 (C. C. A. 6th).

[11] E. g., Section 206 of the Revenue Acts of 1924 and 1926.

[12] *Greenleaf Textile Corp.* v. *Commissioner*, 26 B. T. A. 737, affirmed, 65 F. 2d 1017 (C. C. A. 2d); *Gottlieb Realty Co.* v. *Commissioner*, 28 B. T. A. 418.

to ascertain the tax liability for prior years;[13] in order to determine the base for depreciation of property it might be necessary to determine how much depreciation had been allowed or was allowable in prior years.[14] It is in situations such as these in which the provision allowing the Board to consider facts relating to others years finds its proper office. Events occurring in prior years may thus be relevant to the determination of the taxpayer's liability for the year in question and therefore may be considered by the Board to that extent. However, where rights of the taxpayer with respect to prior years cannot affect the determination of his correct taxes for the year under consideration, but simply constitute a potential offset in judicial proceedings, they may not be taken into account by the Board. Section 274 (g) explicitly provides that the Board "shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid," and the holding of the majority of the court below, that included among the facts relating to other years which the Board may consider is the "fact" that there is an overpayment for some other year is in plain conflict with the statute.[15]

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[13] *Cornelius Cotton Mills* v. *Commissioner*, 4 B. T. A. 225.

[14] Cf. *Virginian Hotel Corp.* v. *Commissioner*, decided by this Court on June 7, 1943, No. 766, 1942 Term.

[15] In *Barry* v. *Commissioner*, 1 B. T. A. 156, which arose under the 1924 Act, which contained no provision similar to Section 274 (g), the Board had held that it was within its

It is not disputed that the Commissioner's computation of the tax for 1936 based on the corrected inventories is correct. The holding below is that this liability must be mitigated because the correction of the inventories resulted in an overpayment of tax for another unit, 1935. The majority opinion below states that it was not necessary for the Board to determine the amount of taxes for 1935.[16] Yet it is appar-

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function to determine an overpayment for a year as to which no deficiency had been found by the Commissioner and to apply that overpayment against the liability for a year as to which such a deficiency had been determined. In that case, however, instead of asserting the full deficiency determined for the year 1921, the Commissioner had asserted a deficiency reduced by an overassessment for 1920. See comment on that case, in *Gress Manufacturing Co. v. Commissioner*, 3 B. T. A. 977, 981. Moreover, while the legislative history of the 1926 Act appears to shed no light on the point, it is a fair inference that Section 274 (g) was incorporated in that Act for the express purpose of achieving a legislative reversal of the *Barry* decision. And, as has been noted, the Board has consistently held that it has no jurisdiction to determine an overpayment and apply it against a deficiency since the enactment of the 1926 Act.

[16] The Court said (R. 28):

> The Board did not have to determine the amount of the taxes for 1935, it only needed to consider the effect of the change in the inventory which normally should have been the same for each year. Its investigation disclosed the fact that the corrected inventory should not in justice be resorted to in redetermining the tax for either of the years 1935 or 1936.

Insofar as the suggestion in the last sentence of this quotation is concerned we submit that the Commissioner was not only empowered but was impelled by duty to compute the tax for 1936 on the basis of the true facts. See the dissenting

ent that before there can be such an application of an overpayment, and before it can be decided that there is an overpayment it is necessary first to decide what the correct payment should have been, or in other words, what was the correct tax for 1935. For taxes are not imposed upon inventories; they are imposed upon the net income of which inventories are but one factor.[17] And it is precisely such a determination which Section 274 (g) enjoins the Board from making.

We submit that Judge Woodrough correctly stated the law when he said (R. 31):

> The statute, the Board's consistent obedience to it for nearly twenty years, the courts' recognition of it and the acquiescense of the profession have established an administrative system where the taxpayer may appeal to the Board from a deficiency found in any year with assurance that the Board cannot use a former year's underpayment to defeat him and where both the taxpayer and the govern-

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opinion of Judge Woodrough (R. 30): "The return which it made for the year [1936] was untrue and the Commissioner was required to and did determine deficiency which properly adjusted the tax to the true income."

[17] Paragraph 3½ of the taxpayer's amended petition to the Board states (R. 5):

"The Commissioner used an inventory July 1, 1935, of $123,424.25 in computing petitioner's taxable net income for the year ended June 30, 1936. If the same inventory is used June 30, 1935, in computing the taxable net income for the year ended June 30, 1935, *and no other adjustments are made*, there would be a net loss for the year and an overassessment of $11,038.73." [Italics added.]

> ment know that the tax for the year of the deficiency is the only tax the Board can adjudicate. The system is complete, there being other equally certain means, administrative and judicial, to correct over and under assessments or payments in other years.

It should not be assumed that because the Board has no general equity powers to permit a recoupment a taxpayer is wholly without a remedy. He may litigate in the district court or in the Court of Claims, instead of proceeding before the Board. Moreover, by the enactment of Section 820 of the Revenue Act of 1938 [Section 3801 of the Internal Revenue Code], Congress has provided comprehensive *administrative* machinery for the mitigation of the effect of the statute of limitations. And to the extent that a taxpayer is entitled to relief he may seek that relief from the Commissioner in accordance with those provisions.[18] Indeed the enactment of those provisions, if they throw any light at all upon the interpretation to be given to the Board's powers, indicate that Congress did not think that the Board possessed general equity powers. See S. Rep. No. 1567, 75th Cong., 3d Sess., pp. 48–52 (1939–1 Cum. Bull. (Part 2) 779, 814–817).

There is also considerable doubt, even if the Board has jurisdiction to order a recoupment, whether recoupment would be available here. At

[18] We do not suggest that Section 820 mitigates the effect of the statute of limitations in every situation, nor do we take any position as to whether it would apply here.

the time the Commissioner asserted the deficiency for the fiscal year 1936, in the spring of 1940 (R. 7), the period of limitations for the fiscal year 1935 had probably already run,[19] and even *Bull* v. *United States* makes it perfectly clear that recoupment in that case depended upon the fact that the taxpayer's right to refund was alive when the Government proceeded against him for the collection of the second tax. (295 U. S. at 263.)[20]

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

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[19] The Board made no finding as to this, it being unnecessary upon its view as to the absence of jurisdiction to consider the point. However, since the period of limitations as to 1935 is governed by Section 322 of the Revenue Act of 1934, c. 277, 48 Stat. 680, which allows a maximum period of three years, it seems likely that the period had run here.

[20] Moreover, the doctrine of recoupment as set forth in the *Bull* case and *Stone* v. *White*, *supra*, is not available to the taxpayer, in any event, by reason of *McEachern* v. *Rose*, 302 U. S. 56. Although we think that the *McEachern* case is to some extent in conflict with *Stone* v. *White*, and that the latter represents the correct view, nevertheless, as long as the *McEachern* case stands without limitation it forbids the recoupment sought here.

APPENDIX

Internal Revenue Code:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

* * * * *

(U. S. C., Title 26, SEC. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in

court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(g) *Jurisdiction Over Other Taxable Years.*—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

* * * * *

(U. S. C., Title 26, Sec. 272.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited

or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that such portion was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.

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(U. S. C., Title 26, Sec. 322.)

SEC. 1100. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government.

(U. S. C., Title 26, Sec. 1100.)

SEC. 1101. JURISDICTION.

The Board and its divisions shall have such jurisdiction as is conferred on them by chapters 1, 2, 3, and 4 of this title, by Title II and Title III of the Revenue Act of 1926, 44 Stat. 9, or by laws enacted subsequent to February 26, 1926.

(U. S. C., Title 26, Sec. 1101.)

Revenue Act of 1942, c. 619, 56 Stat. 957:

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

(a) *The Tax Court of the United States.*—Effective on the day after the date of enactment of this Act, section 1100 (relating to status of Board of Tax Appeals) is amended by inserting at the end thereof the following new sentence: "The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."

(b) *Powers, Tenure, Etc., Unchanged.*—The jurisdiction, powers, and duties of The Tax Court of the United States, its divisions and its officers and employees, and their appointment, including the designation of its officers, and the immunities, tenure of office, powers, duties, rights, and privileges of the presiding judge and judges of The Tax Court of the United States shall be the same as by existing law provided in the case of the Board of Tax Appeals. * * *

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